



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 5, 2003

Mr. Anthony S. Corbett
Freeman & Corbett, L.L.P.
2304 Hancock, Suite 6
Austin, Texas 78756

OR2003-5439

Dear Mr. Corbett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185434.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received two requests from the same requestor for (1) a demand letter from an attorney to the president of the district's board of directors and (2) contracts or agreements approved by the board of directors or any district employee or consultant since January 1, 2002 that financially obligate the district. You state that, with the exception of one document, the district will release any existing information that is responsive to the second request. You claim that the remaining information that is responsive to these requests is excepted from disclosure under sections 552.103 and 552.105 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we address your arguments with regard to the demand letter that is the subject of the first request for information. You state that the requested information is encompassed by our prior ruling in Open Records Letter No. 2003-2997 (2003). In that ruling, we concluded that a submitted representative sample of submitted information related to reasonably anticipated litigation and was excepted from disclosure under section 552.103. You state that the information at issue in the prior ruling was representative of the demand letter that is the subject of the first request for information. You also inform us that there has been no change in the law, facts, and circumstances on which the prior ruling was based. We therefore agree that Open Records Letter No. 2003-2997 (2003) constitutes a previous determination under section 552.103 of the Government Code with regard to the requested

demand letter.¹ We note, however, that the district received the requested demand letter from an attorney for the opposing parties in the anticipated litigation. As we explained in Open Records Letter No. 2003-2997 (2003), section 552.103 does not except from public disclosure information that the opposing parties in anticipated litigation have seen or to which the opposing parties have already had access.² Thus, Open Records Letter No. 2003-2997 (2003) notwithstanding, the district may not now withhold the requested demand letter under section 552.103. As the district claims no other exception to the disclosure of the demand letter, it must be released.

Next, we address the submitted information that the district seeks to withhold under section 552.105 of the Government Code. We note that section 552.022 of the Government Code appears to be applicable to the information at issue. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). You inform us that the submitted proposal for land appraisal services is responsive to the request for "all contracts or agreements . . . which obligate[] the District in any financial way." We therefore assume that the proposal constitutes "information in [a] contract relating to the receipt or expenditure of public or other funds by [the district]." *Id.* As such, the proposal must be released under section 552.022(a)(3) unless

¹See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (attorney general decision constitutes first type of previous determination under Gov't Code § 552.301(a) when (1) precisely same records or information previously were submitted under Gov't Code § 552.301(e)(1)(D); (2) same governmental body previously requested and received ruling; (3) prior ruling concluded that same records or information are or are not excepted from disclosure; and (4) law, facts, and circumstances on which prior ruling was based have not changed).

²See, e.g., Open Records Decision Nos. 511 at 5 (1988) (governmental body may not invoke statutory predecessor to Gov't Code § 552.103 when parties to litigation have inspected records pursuant to discovery), 454 at 2-3 (1986) (once all parties to litigation have seen particular information relating thereto, governmental body no longer has any legitimate interest under statutory predecessor in withholding that information from anyone else), 493 at 2 (1988) (information provided to parties to litigation not protected from further disclosure by statutory predecessor), 349 at 2 (1982) (where plaintiff had obtained information pursuant to discovery, purpose underlying statutory predecessor had been fully served, and it was no longer applicable), 320 at 1 (1982) (statutory predecessor no longer applicable to information that parties to litigation had already inspected).

it is expressly confidential under other law. You contend that the proposal is excepted from disclosure under section 552.105 of the Government Code. Section 552.105 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (general discussion of discretionary exceptions), 564 at 2 (1990) (statutory predecessor to section 552.105 protects governmental body's planning and negotiating position with respect to particular transactions). As such, section 552.105 does not constitute other law that makes information confidential for purposes of section 552.022. Therefore, based on your representation that the submitted proposal is responsive to the second request for information, we conclude that the proposal is subject to section 552.022(a)(3) and thus may not be withheld from the requestor under section 552.105.

We note, however, that the proposal contains an e-mail address that is confidential under section 552.137 of the Government Code. This exception provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. We have marked the e-mail address in the proposal that is confidential under section 552.137. You do not inform that the individual to whom this e-mail address belongs has affirmatively consented to its public disclosure. Therefore, the district must withhold the e-mail address under section 552.137.

In summary, the district must withhold the marked e-mail address in the proposal under section 552.137. The district must release the rest of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

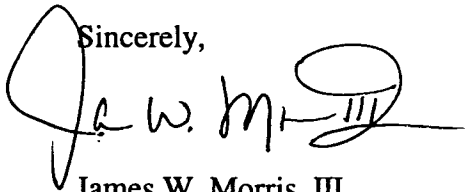
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "W".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 185434

Enc: Submitted documents

c: Mr. John C. McLemore
8400 Cornerwood Drive
Austin, Texas 78717
(w/o enclosures)